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Supreme Court, U.S.
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No. 01-131

In the Supreme Court of the United States

GARY E. GISBRECHT, ET AL., PETITIONER

v.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 406(b) of Title 42, United States Code, provides that, when a claimant for benefits under Title II of the Social Security Act obtains a favorable court judgment awarding benefits, the court may award directly to the claimant's attorney a reasonable attorney's fee as a deduction from the claimant's back-benefits award, in an amount no greater than 25 percent of the back benefits awarded. The question presented is whether the court, when calculating that reasonable attorney's fee, should use an hourly-based "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain other adjustments), or should employ a rebuttable presumption that the attorney should receive 25 percent of the back benefits awarded, the maximum award permitted by the statute.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	1
Statement	2
Summary of argument	8
Argument:	
Courts should use the lodestar method to determine a reasonable attorney's fee under the Social Security Act	10
A. The lodestar method best reflects the plain language of Section 406(b)	10
B. The text and legislative history of Section 406(b) demonstrates that Congress did not intend courts to defer to attorney-claimant fee contracts	18
C. The lodestar method produces a more reasonable result than the presumptive 25 percent contingency method	23
D. Using the lodestar method to determine court-related fees is consistent with the methods set by Section 406(a) for determining agency-related fees	26
E. Neither a presumptive 25 percent fee award nor a risk enhancement of lodestar awards is appropriate to reflect the contingent nature of the fee awards	29
Conclusion	34

TABLE OF AUTHORITIES

Cases:

Allen v. *Shalala*, 48 F.3d 456 (9th Cir. 1995)	6, 7, 31
Blanchard v. *Bergeron*, 489 U.S. 87 (1989)	12, 14, 30
Bowen v. *Galbreath*, 485 U.S. 74 (1988)	2

Cases—Continued: Page

Brown v. *Sullivan*, 917 F.2d 189 (5th Cir. 1990) 6
Buckhannon Bd. & Care Home, Inc. v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001) 11
Burnett v. *Heckler*, 756 F.2d 621 (8th Cir. 1985) 4
City of Burlington v. *Dague*, 505 U.S. 557 (1992) 9, 14, 30, 31, 32
Cotter v. *Bowen*, 879 F.2d 359 (8th Cir. 1989) 6, 17, 21
Coup v. *Heckler*, 834 F.2d 313 (3d Cir. 1987) 4, 6
Craig v. *Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989) 6
Dawson v. *Finch*, 425 F.2d 1192 (5th Cir. 1970) 13
Heckler v. *Day*, 467 U.S. 104 (1984) 22
Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 9
Hopkins v. *Cohen*, 390 U.S. 530 (1968) 3, 4
Hubbard v. *Shalala*, 12 F.3d 946 (10th Cir. 1993) 6
Independent Fed'n of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989) 13
Kay v. *Apfel*, 176 F.3d 1322 (11th Cir. 1999) 6, 11, 21, 31
Lewis v. *Secretary of HHS*, 707 F.2d 246 (6th Cir. 1983) 4
McGuire v. *Sullivan*, 873 F.2d 974 (7th Cir. 1989) 7
McKittrick v. *Gardner*, 378 F.2d 872 (4th Cir. 1967) 4, 11, 13, 24
Ornelas v. *United States*, 517 U.S. 690 (1996) 15
Ramos Colon v. *Secretary of Health & Human Servs.*, 850 F.2d 24 (1st Cir. 1988) 7
Rodriquez v. *Bowen*, 865 F.2d 739 (6th Cir. 1989) 7, 15
Starr v. *Bowen*, 831 F.2d 872 (9th Cir. 1987) 4, 6, 25
Straw v. *Bowen*, 866 F.2d 1167 (9th Cir. 1989) 8
United States v. *Arvizu*, 122 S. Ct. 744 (2002) 15
Webb v. *Richardson*, 472 F.2d 529 (6th Cir. 1972), rev'd on other grounds, 35 F.3d 261 (6th Cir. 1994) 13, 24
Wells v. *Sullivan*, 907 F.2d 367 (2d Cir. 1990) 7, 21
Widrig v. *Apfel*, 140 F.3d 1207 (9th Cir. 1998) 7-8

Statutes and regulations: Page

Act of Aug. 10, 1939, Pub. L. No. 76-379:
§ 201, 53 Stat. 1362 16
§ 206, 53 Stat. 1372 16
Act of Jan. 2, 1968, Pub. L. No. 90-248, § 173, 81 Stat. 877 17
Act of Aug. 5, 1985, Pub. L. 99-80, § 3, 99 Stat. 186 3
Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k) 13
Equal Access to Justice Act:
28 U.S.C. 2412(d) 2
28 U.S.C. 2412(d)(1)(A) 2
28 U.S.C. 2412(d)(2)(A) (Supp. V 1999) 3
Social Security Act, 42 U.S.C. 301 *et seq.*:
Tit. II, 42 U.S.C. 401 *et seq.* 2, 3, 8, 9, 19, 26, 29, 32, 33
42 U.S.C. 405(g) 3
42 U.S.C. 406 25
42 U.S.C. 406(a) 16, 17, 26, 28, 32
42 U.S.C. 406(a)(1) 26, 27, 28, 29
42 U.S.C. 406(a)(2) 18, 27, 28, 29
42 U.S.C. 406(a)(2)(A)(iii) 27
42 U.S.C. 406(a)(3) (1994 & Supp. V 1999) 29
42 U.S.C. 406(b) (1994 & Supp. V 1999) ..... *passim*
42 U.S.C. 406(b)(1) 2, 11
42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999) .. 2, 10, 11, 17
42 U.S.C. 406(b)(2) 2, 19
Tit. XVI, 42 U.S.C. 1381 *et seq.*:
42 U.S.C. 1382 *et seq.* (1994 & Supp. V 1999) 2
42 U.S.C. 1988 14
42 U.S.C. 1988(b) (1994 & Supp. V 1999) 8
20 C.F.R.:
Section 404.1725(b) 29
Section 404.1725(b)(ii) 27
Section 404.1725(b)(iii) 27
Section 404.1725(b)(iv) 27

Miscellaneous: Page

67 Fed. Reg. 2477 (2002) 27
Hearings on H.R. 6675 Before the Senate Comm. on Finance, 89th Cong., 1st Sess. 512-513 (1965) 25
S. Rep. No. 404, 89th Cong., 1st Sess. (1965) 19, 24

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 238 F.3d 1196. The decisions of the district courts (Pet. App. 17-22, 23-32, 33-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2000. A petition for rehearing was denied on April 20, 2001. Pet. App. 43. The petition for a writ of certiorari was filed on July 19, 2001, and was granted on November 26, 2001. The jurisdiction of this Court rests under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Social Security Act are reprinted in the appendix to the brief for petitioners. Pet. Br. App. 1-8.

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, establishes special rules applicable to efforts by attorneys to collect fees from their clients for representation in court in any case in which a claimant seeks old-age, survivor, or disability benefits under Title II of the Act.[1] Section 406(b) of Title 42 sets forth the exclusive method by which an attorney may obligate a claimant for Title II benefits to pay an attorney's fee in the event "a court renders a judgment favorable to a claimant." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999).[2] The statute directs the court to determine "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. *Ibid.* Once the court has set the fee, the Commissioner of Social Security may deduct the fee amount from the claimant's payment of past-due benefits, and pay the fee directly to the attorney. *Ibid.*

In addition, a prevailing claimant for Title II benefits may seek an attorney's fee award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in any case in which the Commissioner's position in the litigation was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). Any EAJA fee is paid by the govern-

[1] No provision of the Act governs attorney's fee requests for litigation seeking Supplemental Security Income (SSI) benefits under Title XVI of the Act (42 U.S.C. 1382 *et seq.* (1994 & Supp. V 1999)). See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988).

[2] "[N]o other fee may be payable or certified for payment for such representation except as provided in this paragraph." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999). "Any attorney who charges, demands, receives, or collects" a fee "in excess of that allowed by the court" under Section 406(b)(1) may be charged with a misdemeanor. 42 U.S.C. 406(b)(2).

ment out of the treasury, rather than being deducted from the claimant's past-benefits award. Congress expressly provided that an award under Section 406(b) of the Social Security Act "shall not prevent an award of fees and other expenses under section 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186. Congress also required that "the claimant's attorney refund[] to the claimant the amount of the smaller fee." *Ibid.* Thus, an EAJA award offsets an award under Section 406(b), so that the actual amount that the claimant receives out of the past-due benefits will be increased by the amount of the EAJA award up to the point the claimant receives 100 percent of the past-due benefits. EAJA imposes limits on the size of an award, including the express limit of fees to $125 per hour, which may be increased to reflect a cost of living adjustment. See 28 U.S.C. 2412(d)(2)(A) (Supp. V 1999).

2. Petitioners brought three separate actions in the district court for the district of Oregon under 42 U.S.C. 405(g), seeking social security disability benefits under Title II.[3] All three petitioners prevailed on the merits

[3] Although the claimants are named as the petitioners in this case, the real parties in interest are their attorneys, who are actually seeking to *decrease* the claimants' net awards of past-due benefits. See *Hopkins* v. *Cohen*, 390 U.S. 530, 531 n.2 (1968). Nevertheless, for ease of reference, we will follow this Court's practice in *Hopkins* (see *ibid.*) and refer to the claimants, rather than their attorneys, as petitioners.

Similarly, the Commissioner is the respondent because of her role as defendant in the underlying claims for benefits. The Commissioner, however, does not have a direct financial stake in the outcome of Section 406(b) fee litigation because the fee award generally will be deducted from the claimant's back benefits and will not result in an additional charge against the Treasury. The Commissioner thus serves a role in the litigation analogous to that of a trustee for the benefits claimant. Courts uniformly have per-

of their claims, with the district courts in each case reversing the decision of the Commissioner to deny benefits. Pet. App. 5. All three petitioners then sought attorney's fee awards against the Commissioner under EAJA, which all three district courts awarded.[4]

Counsel then moved for additional fee awards under Section 406(b). Attorneys Tim Wilborn and Ralph Wilborn represented petitioners in all three cases, and they asked in each of the cases for an award of the maximum amount of 25 percent of petitioners' back benefits. Pet. App. 19, 30, 33. The contracts signed by all three petitioners state that they agree to pay counsel 25 percent of past due benefits recovered, with no mention of any

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mitted the Commissioner or her regulatory predecessors to participate as a party in Section 406(b) attorney's fee litigation to represent the interests of the claimants and to ensure the proper administration of the statutory scheme. See, *e.g.*, *Burnett* v. *Heckler*, 756 F.2d 621, 624 (8th Cir. 1985) ("[T]he Secretary is entitled to participate in attorney's fee matters to protect the claimant's interest."). Accord *McKittrick* v. *Gardner*, 378 F.2d 872, 875 n.4 (4th Cir. 1967); *Lewis* v. *Secretary of HHS*, 707 F.2d 246, 248 (6th Cir. 1983); *Starr* v. *Bowen*, 831 F.2d 872, 874 (9th Cir. 1987). But cf. *Coup* v. *Heckler*, 834 F.2d 313, 325 (3d Cir. 1987) (recognizing Secretary's standing but suggesting role be limited to "explain[ing] what * * * an appropriate fee for the work in the district court would be, if calculated in accordance with the [Secretary's] standards"). In a prior dispute over attorney's fees under Section 406(b), this Court raised no question concerning the participation of the Secretary of Health and Human Services as respondent. *Hopkins*, 390 U.S. at 530. Indeed, because a social security disability claimant is unlikely to hire new counsel to litigate fee issues, the Commissioner generally will be the only party in a position to oppose an unreasonable fee request.

[4] Gisbrecht was awarded $3339.11 (Pet. App. 17); Miller was awarded $5164.75 in fees and $80.42 in expenses (*id.* at 27); and Sandine was awarded $6836.10 in fees and $253.16 in expenses (*id.* at 33).

other method for calculating fee payments, such as an hourly rate. *Id.* at 74, 79, 84.[5] In addition, counsel submitted affidavits, from themselves and other lawyers, asserting that it is the "universal practice," in Oregon and across the country, for counsel to undertake social security litigation on a contingency basis, with the claimant agreeing to pay counsel 25 percent of their retroactive benefits. *Id.* at 56, 60, 88, 89, 91.

In addition, counsel submitted excerpts from an Oregon State Bar Economic Survey (the Flikirs report), giving ranges of hourly rates for different types of lawyers. by geographic location in the state, years of practice, and subject-matter areas of practice. Pet. App. 93-97. Among the findings of this survey are that the statewide median rate for all lawyers is $130 an hour, with a range in Portland from a low rate of $25 an hour to a high rate of $300. *Id.* at 94. Lawyers with 4-6 years experience (like Tim Wilborn, who was principal counsel in these cases (see *id.* at 45)) have a median rate statewide of $115 an hour ($125 an hour in Portland). *Id.* at 95.

3. In all three cases, the district courts denied counsel's request for the statutory maximum of 25 percent of the back benefits awarded. Citing prior Ninth Circuit precedents in social security cases, the courts all calculated the fees by using the lodestar method (multiplying a reasonable number of hours spent by a reasonable hourly rate for the lawyer's local market). Pet. App. 18-19, 24-25, 29-30, 35. Each district court thus rejected counsel's argument that 25 percent of the

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[5] In affidavits addressing two of the cases underlying the petition, Tim Wilborn stated that his contract called in the alternative for $250 per hour. Pet. App. 50, 64. This appears to contradict the terms of the contracts themselves. *Id.* at 74, 84.

back benefits is the market rate on the grounds that it was contrary to Ninth Circuit precedent and was not supported by the record. *Id.* at 19-21, 24-25, 30-31, 36-38. Instead, all three courts adopted a rate of $125 per hour for Tim Wilborn (*id.* at 21) and refused to enhance the lodestar to take into account the contingent nature of the fees. *Id.* at 14, 21-22, 26, 39-40.[6]

4. Petitioners appealed all three cases, which the court of appeals consolidated for argument and decision. Pet. App. 5.[7] The court of appeals affirmed all of the fee awards. *Ibid.* At the outset of its decision, the court of appeals explained that it has long followed the lodestar method of calculating fees under Section 406(b), citing *Allen* v. *Shalala*, 48 F.3d 456, 458 (9th Cir. 1995), and *Starr* v. *Bowen*, 831 F.2d 872, 874 (9th Cir. 1987). Pet. App. 6. It noted that the Fourth, Fifth, and Eighth Circuits also follow the lodestar method,[8] but that the

[6] The *Miller* court set a separate rate for Ralph Wilborn at $150 per hour. Pet. App. 31.

[7] The consolidated court of appeals decision also considered the award in a fourth case, *Anderson* v. *Apfel*. See Pet. App. 4. In that case, the Wilborns asked for $10,013.50, calculated at $175 per hour, a sum that would have been 7.8 percent of the back-benefits award. *Id.* at 12. The district court in *Anderson* instead set the rate at $150 per hour. *Id.* at 15. Anderson joined the other three claimants as petitioner in this Court, but on November 26, 2001, this Court granted the petition only as to the three other claimants and denied it as to Anderson.

[8] Citing *Brown* v. *Sullivan*, 917 F.2d 189 (5th Cir. 1990); *Cotter* v. *Bowen*, 879 F.2d 359 (8th Cir. 1989); and *Craig* v. *Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989). In addition to the three circuits cited by the court of appeals, the Third, Tenth, and Eleventh Circuits also follow the lodestar rule. See *Coup* v. *Heckler*, 834 F.2d 313 (3d Cir. 1987); *Hubbard* v. *Shalala*, 12 F.3d 946 (10th Cir. 1993); *Kay* v. *Apfel*, 176 F.3d 1322 (11th Cir. 1999). One other court of appeals, the First, has not

Second, Sixth and Seventh instead follow the "contingency" method, under which the court treats as presumptively reasonable the agreement between the claimant and the attorney to pay the attorney a percentage of the recovery.[9] The court explained that it has previously "noted the split of circuits and has rejected the contingency method expressly." *Id.* at 6 n.2 (citing *Allen*, 48 F.3d at 459).

The court of appeals rejected petitioners' argument that the "market rate" that should be used to calculate fees under the lodestar method is 25 percent of the past-due benefits. The court reasoned that to do so would "in essence" mean that it would be adopting the contingency method, even though it rejected that method in *Allen*. Pet. App. 7. To the extent that petitioners "are attempting to blur the distinction between the lodestar and contingency methods," the court held, "their argument is unavailing." *Ibid.* The court also found that the district courts did not abuse their discretion in setting hourly rates at $125 and $150 per hour, explaining that the Oregon State Bar survey shows those rates to be the average hourly rates for lawyers of comparable experience. *Id.* at 8.

In addition, the court rejected petitioners' argument that it should increase the lodestar to reflect the contingent nature of Section 406(b) cases as a class, noting that it had previously rejected such an enhancement in *Widrig* v. *Apfel*, 140 F.3d 1207, 1210-1211 (9th Cir.

explicitly required the lodestar method, but has rejected the contingency method. See *Ramos Colon* v. *Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988) (per curiam).

[9] Citing *Wells* v. *Sullivan*, 907 F.2d 367 (2d Cir. 1990); *McGuire* v. *Sullivan*, 873 F.2d 974 (7th Cir. 1989); and *Rodriguez* v. *Bowen*, 865 F.2d 739 (6th Cir. 1989) (en banc).

1998). Pet. App. 8-9. The court observed that petitioners "do not argue that any of these four cases was particularly risky on an individual basis." *Id.* at 9 n.3. The court held that to enhance the lodestar rates to take into account the fact that lawyers sometimes lose their cases and thus do not get paid under Section 406(b) is improper because it would mean "'essentially asking victorious claimants to "subsidize" the claims of losing claimants' by 'tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants.'" *Id.* at 9 (quoting *Straw* v. *Bowen*, 866 F.2d 1167, 1171 (9th Cir. 1989)).

SUMMARY OF ARGUMENT

Section 406(b) of the Social Security Act, enacted in 1965, grants courts the responsibility to "determine and allow * * * a reasonable fee" for attorneys who successfully represent claimants for Title II benefits. 42 U.S.C. 406(b) (1994 & Supp. V 1999). In the decades since Congress adopted this fee provision, courts have had extensive experience determining "reasonable" attorney's fees under many statutes, including 42 U.S.C. 1988(b) (1994 & Supp. V 1999), which, in language common to other fee-shifting statutes and to Section 406(b), authorizes courts to "allow * * * a reasonable attorney's fee" to prevailing parties.

Courts routinely calculate "reasonable" attorney's fees under such statutes by the lodestar method, under which the attorney submits documentation of the hours spent on the case and of the prevailing hourly rate in the local market for similar services. The court reviews those submissions and determines an appropriate number of hours and an appropriate hourly rate, which when multiplied together yield the total award.

The lodestar method has become a well-established feature of this Court's attorney's fees jurisprudence, and accordingly, there is "a 'strong presumption' that the lodestar represents the 'reasonable' fee." *City of Burlington* v. *Dague*, 505 U.S. 557, 562 (1992) (citation omitted). As this Court held in *Hensley* v. *Eckerhart*, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 461 U.S. 424, 433 (1983). Just as with the fee-shifting statutes at issue in *Hensley* and its progeny, the lodestar method is the most appropriate one for courts to use to "determine and allow * * * a reasonable fee" in social security cases under Section 406(b). The text and legislative history of Section 406(b), which demonstrate Congress's intent that courts should "determine" a "reasonable" fee within the statutory cap of 25 percent of the back benefits awarded as a way to protect Title II Social Security claimants from abusive fee arrangements, confirms the appropriateness of the lodestar method.

Petitioners' alternative method—under which an award of 25 percent of the back benefits is presumptively reasonable—is inconsistent with the text and legislative history of Section 406(b). Indeed, petitioners' approach would turn Section 406(b) on its head, transforming the statute's maximum fee award into the presumptive minimum fee award as well. Rather than relying on such key fee-related factors as the quality and amount of the legal services provided, under petitioners' approach the size of the fee would depend primarily on factors relevant to the amount of back benefits owed but largely unrelated to a reasonable

rate, such as the amount of delay in obtaining the back-benefits award, the amount of the claimant's earnings and years of covered employment over the course of his career, and the number of the claimant's dependents. As a result, petitioners' approach would frequently overcompensate counsel at the expense of the very claimants Congress sought to protect by enacting Section 406(b).

The lodestar method, in contrast, does not produce such anomalous and unfair results. Rather, it is precisely tailored to provide the compensation for attorneys in each case that is appropriate for the legal services provided. That is what Congress intended by a "reasonable" fee.

Finally, for the same reasons this Court articulated in *Dague*, the lodestar in Section 406(b) cases should not be enhanced because an award of fees is contingent on an award of back benefits. Petitioners' proposed contingency enhancement would generally serve to make Section 406(b)'s 25 percent cap on fees the presumptive fee in most cases, and would frustrate the statute's primary goal of ensuring that the claimant keep as much of the back-benefits award as possible.

ARGUMENT

COURTS SHOULD USE THE LODESTAR METHOD TO DETERMINE A REASONABLE ATTORNEY'S FEE UNDER THE SOCIAL SECURITY ACT

A. The Lodestar Method Best Reflects The Plain Language Of Section 406(b)

1. Congress provided in Section 406(b)(1)(A) that when an attorney has represented a claimant for benfits and obtains a favorable judgment, "the court may determine and allow as part of its judgment *a reasonable fee* for such representation, *not in excess of*

25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999) (emphases added). The statute thus affirmatively grants the court, not the claimant and his attorney, the power to set a "reasonable" fee "not in excess of 25 percent" of the back benefits awarded. Accordingly, the amount of the fee award is expressly determined by the court as an exercise of its discretion within the parameters established by the statute. See, *e.g.*, *Kay* v. *Apfel*, 176 F.3d 1322, 1325 (11th Cir. 1999) ("courts have an affirmative duty to ensure that a Social Security claimant's attorney receives only a 'reasonable' fee, regardless of the contractual arrangements the claimant and his attorney may have reached"); *McKittrick* v. *Gardner*, 378 F.2d 872, 873 (4th Cir. 1967) ("our reading of the statute * * * requir[es] the court in every case to fix and determine a reasonable fee for services rendered in the court").[10]

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[10] Amicus the National Organization of Social Security Claimants' Representatives (NOSSCR) contends (NOSSCR Br. 7) that "[t]he lodestar method's initial focus on hours and rates * * * is inconsistent with the order in which Congress placed the phrases in §406(b)(1)" because it ignores Section 406(b)(1)'s initial requirement that there be a favorable judgment for the claimant. The requirement of determining that there is a favorable judgment before determining a reasonable fee, however, is not inconsistent with the lodestar method, as evidenced by the "prevailing party" requirement of most fee-shifting statutes. See, *e.g.*, *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598 (2001). Moreover, the requirement follows directly from the statute's prohibition of any fee award in cases that do not lead to a payment of back benefits. See note 2 *supra*. In reality, it is NOSSCR that seeks to reorder the statute, but contrary to its assertion (NOSSCR Br. 7-8), Section 406(b) does not require a court to apply the 25 percent limitation "before

Petitioners nevertheless contend that Section 406(b) restricts the court's role merely to determining the "upper limit of the range of reasonable fees" (Pet. Br. 40) and then reviewing the contract between the claimant and his counsel to determine whether the fee provided for by the contract is "within the range" of reasonable, non-abusive fees (*id.* at 16). According to petitioners, "nothing in [the] language or the legislative history of section 406(b) contemplates that the court should go further and select from within the range of non-abusive fees the amount which the judge thinks most appropriate." *Ibid.*

Petitioners' assertions are rebutted by the plain language of the statute. On its face, Section 406(b) gives a court the power to select a particular fee that it concludes is "reasonable," not just non-abusive. The statute provides for the *court*, not the claimant, his attorney, or their fee contract, to "determine" the "fee." Nothing in its language suggests that the court's role is limited to reviewing the existing fee contract and intervening only in the rare instance when that contract is abusive, as petitioners claim. The focus of the statute is on "a reasonable fee," not a "reasonable fee contract." Although the fee agreement itself may be a relevant factor courts can consider in determining the lodestar, see *Blanchard* v. *Bergeron*, 489 U.S. 87, 93 (1989), nothing in either the statute or this Court's decisions regarding attorney's fees suggests that the contractual fee should control the court's determination of a reasonable fee. *Id.* at 94 (lodestar remains "centerpiece of attorney's fee awards" even where "prevailing party

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reaching the 'reasonable fee' test." Rather, on its face, the statute first calls on the court to determine a reasonable fee, and then states that it may "not [be] in excess of 25 percent * * *."

and his (or her) attorney have executed a contingent-fee agreement").

Petitioners mistakenly contend (Pet. Br. 29) that it would be "anachronistic" to adopt the lodestar analysis for Section 406(b) claims because, when Congress enacted Section 406(b) in 1965, relatively few attorneys in private practice used hourly billing methods and the courts had not yet developed the formal lodestar analysis. This Court, however, has not hesitated to apply the lodestar method to other statutes requiring a "reasonable" fee, most notably the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), even though they were enacted before the development of the formal lodestar analysis. See *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989) (similar language between Section 2000e-5(k) and other attorney's fee provisions "is 'a strong indication' that they are to be interpreted alike"). Moreover, long before this Court formally adopted the lodestar method in *Hensley*, courts had rejected the central premise of petitioners' argument—that Section 406(b) requires courts to defer to a preexisting 25 percent contingency contract, rather than setting a fee the court deems the most reasonable. *E.g.*, *McKittrick*, 378 F.2d at 873-874 ("'Routine approval of the statutory maximum allowable fee should be avoided in all cases,' and this is true whether or not the fee claim has a contractual basis. * * * [Section 406(b)] requires the court to fix and allow a reasonable fee for services rendered" and "appears to contemplate no blind deference to contractual fee arrangements.") (citation omitted); *Dawson* v. *Finch*, 425 F.2d 1192, 1195 (5th Cir. 1970) (same); *Webb* v. *Richardson*, 472 F.2d 529, 538 (6th Cir. 1972) (same), rev'd on other grounds, 35 F.3d 261 (6th Cir. 1994).

Petitioners attempt to find support for their reading of the statute in its use of the phrase "*a* reasonable fee" rather than "*the* reasonable fee." They argue that the indefinite article "a" suggests a range of reasonable fees, and that the existence of this range somehow alters the meaning of term "determine." Pet. Br. 20-21. According to petitioners, a requirement to "determine *the* reasonable fee" would "suggest[] that there is one particular fee that is reasonable, and * * * the court is to detect what it is," whereas "the phrase 'determine *a* reasonable fee' means only that the court will definitively resolve what the fee is, and that the fee chosen must be reasonable." *Ibid.* But Congress's use of an indefinite rather than a definite article in this case is too thin a reed on which to build a theory of statutory construction, especially in light of the "strong presumption" favoring the lodestar method. See *Dague*, 505 U.S. at 562.

To the extent the indefinite article suggests anything, it underscores the district court's discretion (and suggests an abuse of discretion standard of review). Thus, the existence of a range of reasonable fees is in no way inconsistent with the lodestar analysis, as even petitioners are forced to concede. See Pet. Br. 21 (phrase "determine *a* reasonable fee" "does not purport to indicate how the court is to make the choice among the range of fees that would be reasonable"). Indeed, far from being inconsistent with the lodestar method, such discretion is one of the lodestar method's principal attractions. See *Blanchard*, 489 U.S. at 87 ("a private fee arrangement is but one of the many factors to be considered and cannot, standing alone, impose an automatic limitation on the exercise of the trial judge's discretion, which is central to the operation of [Section 1988's "reasonable fee" requirement]").

Petitioners' asserted presumption in favor of a fee award equal to 25 percent of back benefits would render Section 406(b)'s requirement of a "reasonable" fee largely meaningless. The term "reasonable" generally signals a preference for a contextual analysis taking a variety of factors into account. See, *e.g.*, *United States* v. *Arvizu*, 122 S.Ct. 744, 751 (2002) ("reasonable" suspicion requires courts to look at "totality of the circumstances," and should not be reduced to "'a neat set of legal rules'") (quoting *Ornelas* v. *United States*, 517 U.S. 690 (1996)). Yet petitioners' urge what amounts to a single variable analysis. Petitioners would convert the 25 percent ceiling into the presumptive floor as well, and courts always would award a fee of 25 percent, except in the unusual case where such a high fee would be clearly "abusive."[11] But Section 406(b) does not say that counsel will get 25 percent unless that amount is abusive or outside the "outer limit of reasonableness" (Pet. Br. 27 (citation omitted)). Rather, it says that counsel will get "a reasonable fee * * * not in excess of 25 percent * * *," as determined by the court. Thus, as the text of Section 406(b) indicates, the touchstone of the statute is a reasonable fee, with 25 percent

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[11] Thus, for example, the Sixth Circuit, which generally follows petitioners' contingency method, would reduce a fee award below 25 percent of the back benefits where counsel's improper conduct delayed the final judgment, thereby causing the amount of back benefits to increase (which in turn would increase the fee award under a straight 25 percent calculation), or where counsel "would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended." *Rodriquez*, 865 F.2d at 746. Unlike petitioners' presumption, however, the Sixth Circuit has indicated that, regardless of the fee contract, courts "should only allow maximum fees for extensive effort on the part of counsel who have overcome legal and factual obstacles to the enhancement of the benefits awarded to his client." *Id.* at 747.

the upper limit, not, as petitioners would have it, a 25 percent fee, with unreasonableness as an infrequent exception.[12]

Moreover, if, as petitioners contend, Congress had intended for courts merely to set the "upper limit of the range of reasonable fees" (Pet. Br. 40) and to defer to any agreement between the attorney and claimant within that limit, it would have written a very different statute. Notably, at the time Congress enacted Section 406(b) in 1965, a preexisting provision regulating attorney's fees for work done before the agency provided that the agency "may, by rule and regulation, prescribe *the maximum fees which may be charged* for services performed in connection with any claim before the [agency]." Act of Aug. 10, 1939, Pub. L. No. 76-379, § 201, 53 Stat. 1362, 1372 (emphasis added). The 1965 amendments simultaneously retained this authorization for the agency to set "maximum" fees in administrative proceedings (as Section 406(a) of the Social Security Act) and enacted Section 406(b) to regulate court-related attorney's fees. Rather than limiting courts to determining the "maximum" fees allowable for a particular representation, however, Congress chose to

[12] Yet another problem with petitioners' excessive focus on the percentage fee set in the contracts, which is uniformly set at 25 percent of the back benefits awarded, is that Congress already provided substantial guidance about what amount of fees are reasonable in relation to the amount of back benefits awarded, namely not more than 25 percent. The lodestar method gives the court a meaningful role by allowing them to determine what fees would be reasonable in relation to other factors, such as hours worked or the difficulty of the issues. By forcing courts to focus on fee contracts that uniformly reflect the 25 percent statutory cap, petitioners' methodology renders both the court's role and the statutory phrase "a reasonable fee" largely redundant.

authorize courts to "determine * * * *a reasonable fee*." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999).[13]

Petitioners' assertion that "reasonable" as used in Section 406(b) only permits the court to determine the "outer limit of reasonableness" (Pet. Br. 27 (citation omitted)) would render meaningless the obvious textual differences between Section 406(b)'s authorization for courts to "determine * * * a *reasonable* fee" and the then-existing Section 406(a)'s authorization for the agency to "prescribe * * * *maximum* fees." Moreover, Congress in January 1968 amended Section 406(a) to add authority for the agency to "fix * * * *a reasonable fee*" for work done before the agency. Act of Jan. 2, 1968, Pub. L. No. 90-248, § 173, 81 Stat. 877 (emphasis added). Petitioners' contention that determining "a reasonable fee" means determining only the maximum "non-abusive" fee is thus belied by the 1968 amendments granting the agency, which already had the authority to establish "maximum" fees, the additional power to set "a reasonable fee."

Finally, petitioners' proposed rule also is inconsistent with the statutory text because it renders the 25 percent ceiling an ineffective check on excessive fee awards. Under the lodestar method, courts focus on the reasonableness of fees and consider the amount of

[13] To counterbalance this more intrusive regulation of court-related fee awards, Congress provided for the direct payment of attorney's fees out of the award of back benefits, thereby eliminating the substantial problems lawyers had faced in collecting fees from Social Security claimants, who generally had few if any assets. See 42 U.S.C. 406(b)(1)(A); *Cotter*, 879 F.2d at 360 ("Enacted in part in response to 'inordinately large' contingency fee awards, Congress also sought through section 406 to ensure representation of Social Security disability claimants by providing for payment of a 'reasonable fee' directly from past due benefits.").

work performed and the difficulty of the issues involved. The resulting presumptive fee award is calculated *in dollar terms* and is determined *independently* of the amount of *back benefits awarded.* As a result, the 25 percent ceiling provides a meaningful independent check on the dollar-based fee award. Petitioners' rule, by contrast, would generate the presumptively reasonable fee based on the fee contract, which typically calculates the fee award as a *direct* percentage (25 percent) of the back benefits awarded. Because petitioners' presumptive fee award is not generated independently of the amount of back benefits, the 25 percent of back benefits ceiling provides no meaningful independent check on the fees. At best, district courts would be left to their own devices to determine, for example, that a 20 percent award appears more reasonable than a 25 percent award, and at worst the statute would be rendered meaningless. To avoid this problem in the one context (administrative fees) in which the statute allows attorney's fees to be measured in part based on the contractual terms, the statute provides a dollar cap in addition to the 25 percent ceiling. See 42 U.S.C. 406(a)(2) (administrative fees not to exceed $4000). Thus, in that context, the dollar cap provides a meaningful and independent check on the amount of fees.

B. The Text And Legislative History of Section 406(b) Demonstrates That Congress Did Not Intend Courts To Defer To Attorney-Claimant Fee Contracts

The text of Section 406(b) demonstrates that Congress did not adopt a regime, like that envisioned by petitioners, that gives deference to contractual fee arrangements between the claimant and his attorney. The statute, by its terms, grants courts the authority to

determine the fee, and specifically provides that a contract providing a fee in excess of 25 percent can never be honored by the courts. Congress then removed any doubt on that score by limiting attorneys to the court-determined fee and forbidding any other privately-ordered fee arrangement. 42 U.S.C. 406(b)(2). A rule giving presumptive validity to privately-negotiated fee arrangements is inconsistent with the statute's text.

The legislative history confirms that deference to a 25 percent contingency contract would be contrary to Congress's intent. Congress adopted the fee provision of Section 406(b) in 1965 to prevent the often excessive fees lawyers in social security cases were charging at that time. The Senate Report explained the Committee's findings:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965). Congress thus enacted Section 406(b) as a response to the problem of lawyers charging their Title II clients "inordinately large fees," and Congress cited as examples of such abusive fees contingency contracts calling for payment of "one-third to one-half" of the back benefits. Indeed, petitioners themselves acknowledge

(Pet. Br. 31) that "[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants."

The committee report reflects Congress's concern that lawyers who handle Social Security cases have unequal bargaining power over persons who seek benefits, thus allowing the lawyers to extract unfairly generous terms in their employment contracts. A presumption that the attorney's fee award should be 25 percent of the back benefits because that is what the contract provides is inconsistent with this congressional concern. It is unlikely that Congress, having concluded that agreed-upon attorney's fees that "upon occasion" total 33 percent of the back benefits are abusive, intended a standard that would require courts to uphold attorney's fees of 25 percent (only 8 percent less) in all but the exceptional cases. Congress's desire to outlaw 33 percent fee payments suggests that the 25 percent figure was truly intended as a ceiling and awards of that magnitude should be allowed only in the occasional case where counsel can persuade the court that a fee that high is appropriate based on the particular facts of that case.

The very record that was made below by petitioners suggests that problems with unequal bargaining power continue today. All three contracts in the cases that underlie this petition called for a flat fee of 25 percent of back benefits—the maximum allowed by Congress. Pet. App. 74, 79, 84. Moreover, counsel submitted affidavits from themselves and from other lawyers in various parts of the country, all of which assert that it is the "universal practice" for lawyers throughout the country to obtain agreements from their clients in social security cases on exactly those terms. *Id.* at 56, 60, 88, 89, 91. In other words, Social Security claimants appear

to lack the ability to bargain meaningfully with their lawyers over the price for legal services. Rather, virtually all counsel demand and receive agreements for a fee at the statutory maximum.

Accordingly, those courts that follow petitioners' proposed contingency method are mistaken when they say that "the best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." *Wells* v. *Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990). To the contrary, Congress gave the courts the responsibility of determining a reasonable fee precisely because it concluded that claimants were not able to negotiate attorney's fees freely, but rather were often compelled to agree to "inordinately large" contingent fee arrangements with fixed percentages. See *Kay*, 176 F.3d at 1326 ("Our preference for the lodestar method also reflects the fact that §406(b) is designed to protect a particularly vulnerable class of claimants. Many claimants in Social Security benefits cases are minors, or incompetent to manage their affairs, or disadvantaged by lack of education or by physical or mental impairments.") *Cotter*, 879 F.2d at 360 ("Section 406 is a *parens patriae* limit on the amount of fees an attorney may receive from a disability claimant, usually an individual of limited resources, who suffers the additional handicap of a severe physical or mental disability."). Likewise, the very fact that the prevailing "agreement" nationwide is for the statutory maximum underscores the continuing need for courts to determine reasonable awards independent

of either the amount of back benefits or the fee arrangement "agreed to" by the claimant.[14]

Finally, the Senate Report expressed the particular concern that fee agreements that call for a percentage of the back benefits can generate an excessively high attorney's fee because "litigation necessarily involves" extensive delays that "in many cases" can produce a high award of back benefits and therefore a large percentage fee. Congress recognized the potential for substantial delays, not only for the administrative process, which often requires delays for processing benefits claims and exhausting administrative remedies, cf. *Heckler* v. *Day*, 467 U.S. 104 (1984), but also for the judicial process of reviewing agency determinations regarding benefits, which can involve extensive delays that vary significantly from one district to another. Congress expressly found that such delays make it unfair to allow attorney's fees to be based blindly on a percentage of back benefits because such a method of setting fees can frequently create excessive fees that have little or no relationship to the quality or amount of legal services provided.

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[14] Notably, amicus the Association of Trial Lawyers of America (ATLA) repeatedly concedes that the lodestar method is appropriate "as a proxy for market forces in those situations where no real market exists which serves the statutory purpose." ATLA Br. 10; *id.* at 3 ("The lodestar method provides a means of approximating the market value of legal services in circumstances where market forces cannot be relied upon to further the purposes of the statute."); *id.* at 5 ("[T]he lodestar model is useful in those circumstances * * * where market forces cannot be relied on to set a reasonable fee."). What ATLA and petitioners fail to recognize, however, is that Congress has expressly determined that the market for legal services for Social Security claims is precisely the kind of unreliable market for which the lodestar method is designed.

C. The Lodestar Method Produces A More Reasonable Result Than The Presumptive 25 Percent Contingency Method

The lodestar method of calculating an attorney's fee has the great virtue of looking at the amount of work that counsel actually devoted to a case in determining the proper fee. Logic amply supports the idea, indeed presumption, that a "reasonable" attorney's fee should be based on documentation of the hours that the attorney spent on the case and identification of the fair hourly rate charged by lawyers of similar skill, experience, and reputation in the local market. Under that method, the fee awarded accurately reflects the value of the services rendered by the attorney. By contrast, petitioners' rule that presumptively allows a fee of 25 percent of the back benefits awarded is illogical because it determines whether a fee is reasonable based primarily on factors having much to do with the amount of benefits owed, but little to do with the value of the services actually provided.

Under petitioners' approach, cases involving identical efforts by the attorneys frequently would generate largely disparate fees, depending on such non-fee related factors as the accumulation of accrued benefits due to delay caused by the backlog of cases at each administrative and judicial level of review, the number of dependents a claimant has, and the monthly benefit level that the claimant seeks, which itself varies based on the claimant's income when he was working and the number of years in which he contributed payroll taxes. As the Fourth Circuit rightly observed in *McKittrick*: "The rate of accrual of benefits varies without any relation to the merits of the claim. It is fixed by such things as the claimant's prior earnings and the number of his dependents. The issue in the usual case is

entitlement to benefits; their computation is rarely in question. Unlike personal injury actions, therefore, the amount of the recovery bears no relation to the lawyer's skill, effort or effectiveness." 378 F.2d at 874.

For the same reasons, under petitioners' method, cases with the same amount of back benefits necessarily would produce the same attorney's fees, even when the work that counsel put into the cases varied considerably. Thus, a straightforward case in which counsel filed a short complaint and a short summary judgment memorandum, both containing substantial amounts of boilerplate, would generate the same fee as a case involving novel issues in which counsel had to file lengthy briefs before the magistrate judge, the district court, and the court of appeals, with oral hearings at each level.

Moreover, as some courts have noted, the contingency method creates perverse incentives for attorneys handling Title II claims. "If, in these cases, a contingent fee contract governs the amount of the fee, the dilatory lawyer is given a premium; the prompt, effective lawyer who moves expeditiously is penalized. The regrettable delays in the final adjudication of these claims, in large measure, may be unavoidable, but they should not be compounded by incentives for procrastination and delaying tactics on the part of a claimant's attorney." *McKittrick*, 378 F.2d at 874; see also *Webb*, 472 F.2d at 537. As discussed above, Congress expressly stated that Section 406(b) was intended in part to solve the problem of excessive fees caused by delay. S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965).

Petitioners presumably would allow the court to reduce the fees in cases at the extreme. But it is a strange view of reasonableness that would allow courts routinely to award *different* fees to attorneys doing the

same amount of work and *identical* fees to attorneys doing vastly *different* amounts of work. A statute that calls upon courts to set "a reasonable fee" should not be allowed to produce frequent fees that significantly overcompensate counsel, with the courts stepping in only occasionally when the overcompensation is so great that it becomes egregious. Congress adopted Section 406(b) to protect *all* Social Security claimants and to assure a fair attorney's fee in *all* cases, not simply to eliminate a few extreme cases of excessive fees. After all, "while the attorney's compensation must be sufficient to encourage members of the bar to undertake representation of disability claimants, the disability award, from which the attorney's fee is paid, is normally an already-inadequate stipend for the support and maintenance of the claimant and his dependents." *Starr* v. *Bowen*, 831 F.2d 872, 873 (9th Cir. 1987). A lodestar fee, particularly one that will be paid directly to the lawyer out of the back-benefits award, will encourage sufficient counsel—as it evidently did in each of the cases that underlie this petition, which were all brought despite the Ninth Circuit's well-established use of the lodestar method—without unduly reducing the benefits upon which petitioners rely to meet their daily expenses.

Notably, neither petitioners nor their amici seriously contend that a lodestar approach under Section 406(b) would deny Social Security claimants adequate access to counsel. The provisions of Section 406 providing for direct payment of attorney's fees by the agency out of the award of back benefits, thereby *guaranteeing collection* of fees, provides substantial inducement for attorneys to take Social Security cases. See *Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. 512-513 (1965). Courts in certain

circuits have been applying the lodestar method to Section 406(b) cases for decades. Petitioners have pointed to no evidence suggesting that Social Security claimants in lodestar jurisdictions lack adequate access to counsel, and to the Commissioner's knowledge, no such evidence exists.

D. Using The Lodestar Method To Determine Court-Related Fees Is Consistent With The Methods Set By Section 406(a) For Determining Agency-Related Fees

Petitioners mistakenly argue that a reading of Section 406(b) that would allow only a lodestar calculation of the fee would be inconsistent with what they contend is the more generous contract-based method for calculating attorney's fees for work done in Title II cases at the administrative level, which are governed by 42 U.S.C. 406(a). In fact, Section 406(a) demonstrates that Congress knows how to create a system for awarding fees that gives presumptive weight to a private agreement when it wants to and confirms the appropriateness of applying the lodestar method to determine court-related fees.

Section 406(a) provides two methods by which counsel representing Social Security claimants before the agency can obtain fees. The first method, known as the fee petition process, is provided for in 42 U.S.C. 406(a)(1), which authorizes the Commissioner to "fix * * * a reasonable fee" for the attorney's services. Under the Commissioner's regulations governing this process, the attorney must submit a fee petition setting forth a detailed description of the services provided and expenses incurred in representing the claimant before the agency. The agency official who authorizes the fee, typically an administrative law judge (ALJ), then evaluates the information in the petition and sets a

reasonable fee to reflect the value of the legal services provided. The ALJ will "not base the amount of fee [he] authorize[s] on the amount of the [back] benefit alone, but on a consideration of all the factors listed in" the regulations, which are similar to traditional lodestar factors and include "[t]he complexity of the case," "[t]he level of skill and competence required" of the attorney, and "[t]he amount of time * * * spent on the case." 20 C.F.R. 404.1725(b)(ii), (iii), and (iv).

The second process by which an attorney can get fees for representing a claimant before the agency is known as the fee agreement process and is governed by 42 U.S.C. 406(a)(2). Under this process, if the claimant and his attorney sign and submit a written fee agreement before the agency renders a favorable determination on the claim, the agency will generally approve the agreement if the fee specified therein does not exceed a statutory cap, which is the lesser of 25 percent of the claimant's past due benefits or $4000.[15]

Petitioners contend (Pet. Br. 21) that using the lodestar method to determine court-related fees would be inconsistent with 406(a)(2)'s fee agreement process, which they characterize as "authoriz[ing] awards based on contingent fees for legal representation in the administrative process." But the differences between the fee agreement process of Section 406(a)(2) and court-determined fees under Section 406(b) (or for that matter the fee petition process of Section 406(a)(1)) reflect the markedly different statutory terms gov-

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[15] Under 42 U.S.C. 406(a)(2)(A)(iii), the Commissioner may increase the $4000 limit to reflect the rate of increase in primary insurance amounts since January 1, 1991. Effective February 1, 2002, the Commissioner has set the new limit at $5300. See 67 Fed. Reg. 2477 (2002).

erning the different fee-setting processes. Congress created the fee agreement process of Section 406(a)(2) as an *alternative* to the Commissioner's authority to determine "a reasonable fee" through the fee petition process of Section 406(a)(1), and it had to amend Section 406(a) to provide this alternative precisely because, as the agency's regulations have long recognized, the Commissioner's authority to fix "a reasonable fee" required the agency to undertake an independent evaluation of the value of the legal services provided, rather than merely presume that the contractual fee was the reasonable fee. Accordingly, the distinct nature of the Section 406(a)(2) fee agreement process reflects its distinct role in that statutory scheme. Just as it has no relevance to the Commissioner's implementation of Section 406(a)(1)'s requirement of determining a "reasonable" fee, it has no relevance to the method courts should use in determining a "reasonable" fee under Section 406(b).

In any event, the fee agreement process is not as generous to counsel as petitioners make it seem. On its face, the fees under this expedited option cannot exceed $4000. Moreover, if a case is resolved favorably to the claimant at the administrative level, without the need to seek judicial review and the attendant delay, it is likely that the back-benefits award will be far lower than after litigation, and thus 25 percent of those benefits would produce a significantly smaller fee. In those cases where counsel expect that the claim will generate especially large amounts of back benefits, counsel would likely avoid application of Section 406(a)(2)'s $4000 cap, and seek certification of "a reasonable fee" by the Commissioner under Section 406(a)(1)'s fee petition process. But as discussed above, any fee awarded through that process would not be based on the contingency con-

tract, but would be set independently by the agency to reflect the value of the legal services based upon the factors set forth in 20 C.F.R. 404.1725(b). Moreover, a claimant can timely challenge a fee as excessive in light of the actual services performed. See 42 U.S.C. 406(a)(3).

Finally, more than anything else, the fee agreement process in Section 406(a)(2) demonstrates that Congress knew how to write a statute making the contract between the attorney and claimant presumptively binding subject to a ceiling. Congress did so expressly in Section 406(a)(2) as an alternative to the reasonable fee determination process of Section 406(a)(1). Whatever anomalies may be produced by the fact that Section 406(a)(2) adopts a different regime than the procedures for fees in court cases under Section 406(b), petitioners cannot explain how this Court could (let alone should) harmonize the two modes of awarding fees in light of the starkly different statutory language.

E. Neither A Presumptive 25 Percent Fee Award Nor A Risk Enhancement Of Lodestar Awards Is Appropriate To Reflect The Contingent Nature Of The Fee Awards

Petitioners mistakenly contend (Pet. Br. 34-36) that the lodestar method is inappropriate for Title II litigation because of the contingent nature of fee awards under Section 406(b). In *Blanchard*, however, this Court reaffirmed the general applicability of the lodestar method to attorney's fee claims, including contingent ones, stating: "We have never suggested that a different approach is to be followed in cases where the prevailing party and his (or her) attorney have executed a contingent-fee agreement. To the contrary, in *Hensley* and in subsequent cases, we have adopted the lodestar approach as the centerpiece of attorney's fee

awards." 489 U.S. at 94. Although *Blanchard* left open the possibility that contingency could be a factor considered by the court in determining whether to enhance a lodestar calculation—a possibility since foreclosed by this Court's decision in *Dague*, 505 U.S. at 563-566—the *Blanchard* Court held that neither contingency nor any other factor "is a substitute for multiplying reasonable billing rates by a reasonable estimation of the number of hours expended on the litigation." 489 U.S. at 94.

As an alternative to their proposed presumption in favor of a 25 percent attorney's fee, petitioners argue (Pet. Br. 42-47) that if the Court adopts a lodestar analysis, it should allow an enhancement of fee awards in social security cases *as a class* to reflect the risk inherent in such cases. There would appear to be little if any practical difference between these two proposals.[16] But any method of calculating fees that increases the fee beyond the base lodestar to reflect the contingent nature of Section 406(b) claims would be improper for the same basic reasons this Court rejected a contingency enhancement for fee-shifting statutes in *Dague*. That is true, moreover, whether the contingency enhancement is based on the riskiness of Section 406(b) claims as a class, as petitioners contend it should

[16] The lodestar fee calculations in these three cases (before the mandatory offset for the EAJA fee awards) were $3135.00 (*Gisbrecht*), $5461.50 (*Miller*), and $6550 (*Sandine*). Pet. App. 18, 31, 40. Petitioners had asked for the maximum award of 25 percent of back benefits, which would have been $7091.50, $7514, and $13,988 respectively. See Pet. Br. 8. Petitioners never give a figure as to the size of the risk enhancement they seek, but even if an enhancement is limited to doubling the lodestar (which would only partially reflect their asserted 35 percent success rate in social security cases), that would bring these three awards near to or well over the 25 percent statutory maximum.

be, or whether the contingency enhancement is based on the riskiness of the particular case, as the Ninth Circuit has held, see *Allen*, 48 F.3d at 460.[17]

The Court in *Dague* articulated several reasons for rejecting both general and case-specific contingency enhancements for fee-shifting statutes, and those reasons are equally applicable to Section 406(b). The *Dague* Court rejected a contingency enhancement based on the riskiness of the particular case both because it "would likely duplicate in substantial part factors already subsumed in the lodestar," and because it would "provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones." 505 U.S. at 562-563; see also *id.* at 563 ("[E]nhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately

[17] Although a number of circuits applying the lodestar method to Section 406(b) claims have held that courts may consider contingency in determining whether an enhancement is warranted, only the Ninth and Eleventh have addressed the issue post-*Dague*. See *Allen*, 48 F.3d at 460 (applying only case-specific contingency factor); *Kay*, 176 F.3d at 1327 & n.5 (permitting consideration of contingency as an enhancement factor, but emphasizing "its presence in a given case would not necessarily require an adjustment in order to produce a reasonable fee; the lodestar amount itself may suffice"). Those decisions are flawed. Fee-shifting statutes like those at issue in *Dague* closely resemble Section 406(b), in that both (1) authorize "reasonable attorney * * * fees," and (2) only if the plaintiff prevails. The difference that *Allen*, *Key*, and petitioners emphasize—that fee-shifting statutes impose fees on another party who has not negotiated a fee arrangement, while Section 406(b) directs the fees to come from the claimant who has agreed to a fee—is of little impact in light of Congress's determination that fee "agreements" in this area are distorted. See *supra* at 20-22.

encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the 'reasonable fees' provisions."). Both of these reasons apply equally to Section 406(b) claims.

The *Dague* Court also noted that a general class-based enhancement would be difficult to apply, especially in the absence of a functioning, unregulated market for such fees. 505 U.S. at 564. In addition, such an enhancement would "pay for the attorney's time (or anticipated time) in cases where his client does *not* prevail," thereby violating at least the spirit of the "prevailing party" requirement; deviate from the consistent trend of Supreme Court cases "turn[ing] away from the contingent-fee model"; and frustrate both the "interest in ready administrability that has underlain our adoption of the lodestar approach" and "the related interest in avoiding burdensome satellite litigation." *Id.* at 565-566; see also Pet. App. 9 (noting petitioners are "'essentially asking victorious claimants to "subsidize" the claims of losing claimants' by 'tak[ing] large portions out of disabled people's recoveries to fund the representation of other claimants'") (citation omitted). Again, each of those concerns applies with full force to attorney's fee claims under Section 406(b).

Notwithstanding *Dague*, petitioners contend (Pet. Br. 44) that Section 406(a) warrants a contingency enhancement, even though fee-shifting statutes do not, because "[t]he primary purpose of fee-shifting statutes is to assure the availability of counsel," whereas Section 406(b) "was adopted to assure that the attorneys already representing [Title II] claimants did not collect 'inordinately large' legal fees." That statement, while true, provides an additional reason for *rejecting* a contingency enhancement, not a reason for adopting one. As petitioners themselves concede (Pet. Br. 31),

"[t]he overarching purpose of section 406(b) is to avoid undue reductions in the amount of back benefits actually received by claimants." Because the contingency enhancement that petitioners propose would systematically *reduce* claimants' net benefits, that purpose counsels strongly against any contingency enhancement for fee claims under Section 406(b).

Similarly mistaken is petitioners' argument (Pet. Br. 35-36) that absent an enhancement the relatively low rate of success of Title II judicial challenges would result in an hourly rate substantially below the average market rate for lawyers of comparable seniority and skill that handle other types of cases. As petitioners themselves point out (Pet. Br. 34-35), Title II cases are "unique" in that they often are less complicated than other types of litigation, are generally resolved on summary judgment, and typically involve fewer than 40 hours of legal work. Accordingly, that rates for Title II representations may be less than rates for more complicated litigation is not necessarily a reason for an enhancement.

Petitioners' analysis, moreover, ignores that Section 406(b) fees generally are paid directly to the lawyers out of the award of back benefits, thereby eliminating many of the risks and other costs typically associated with collecting fees. This increased certainty of payment, which Congress intended as the primary assurance that attorneys would undertake Title II representations, was part of the balance that Congress struck when it limited the size of Section 406(b) fees. This direct-payment feature may be one reason why there does not appear to be any documented shortage of lawyers willing to take Title II cases. Petitioners, who themselves undertook the representations in this case in a lodestar jurisdiction without a reasonable

expectation of an enhancement (see Pet. Br. 46), have provided no basis for diverting much needed benefits away from Social Security claimants to provide an additional inducement to attorneys in the form of a contingency enhancement.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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